No. 11235

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the Estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER B. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

PETITION FOR REHEARING.

FILED

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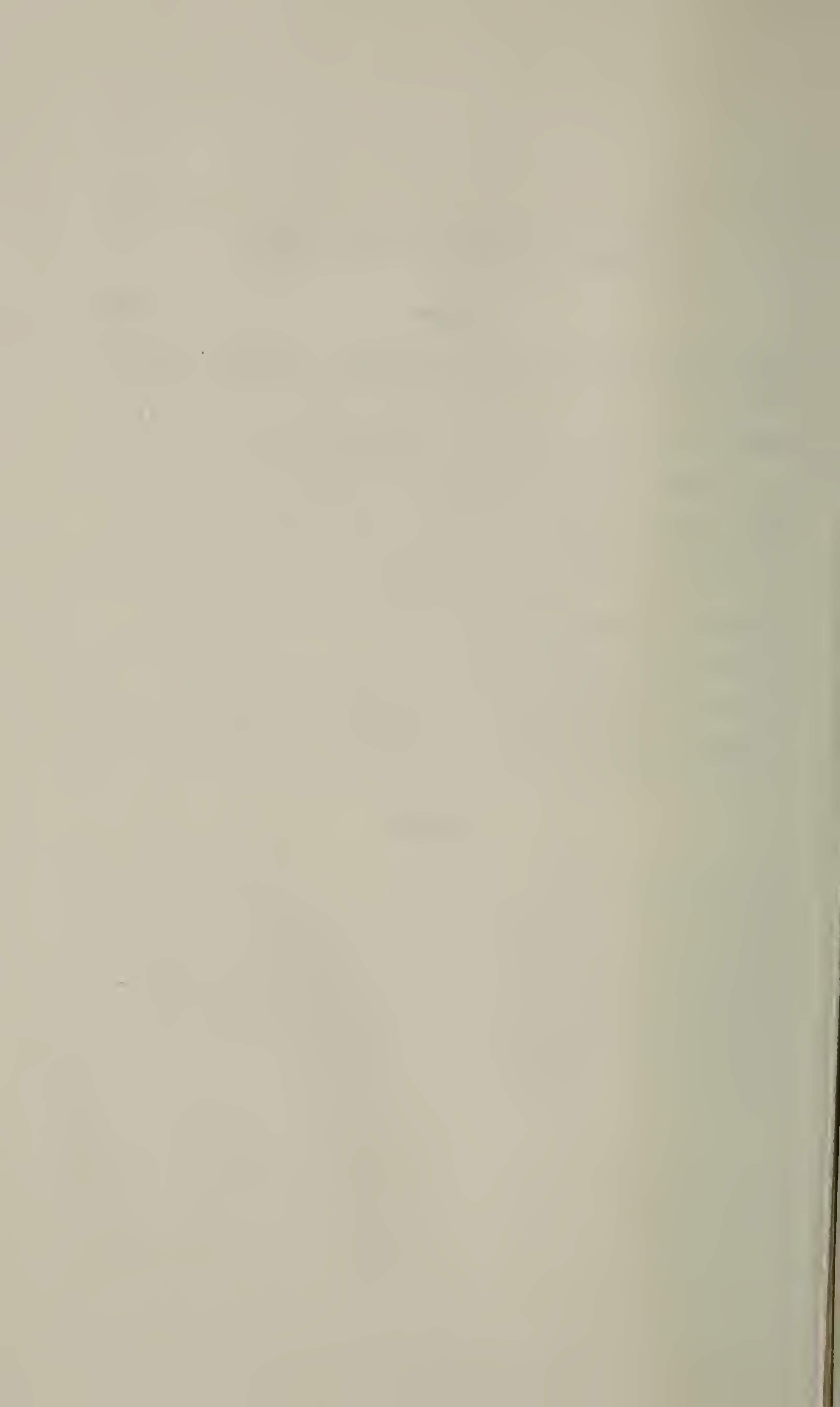

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Now come appellees Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, and, pursuant to Rule 25 of this Court, respectfully petition this Honorable Court for a rehearing and reconsideration of this cause on the following grounds:

1. A question of local law has been decided herein in a way in conflict with applicable local statutes and decisions.

2. The decision entered herein is in conflict with the decision of another Circuit Court of Appeals on a similar question.

3. The District Court did not have jurisdiction to consider this action.

The question involved in this case, it will be recalled, is whether the proceeds of a life insurance policy should go to the estate of the insured's widow, who was named as direct beneficiary but who died after the insured's death and prior to receiving any of the proceeds of the policy, or to the children of the insured by a former marriage who were named as contingent beneficiaries. The controversy relates chiefly to the proper construction of a provision contained in Section 11 of the General Provisions of the policy reading as follows:

> "Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due."

The decision of this Court was that the quoted provision could apply only if the direct beneficiary died during the lifetime of the insured and that the proceeds of the policy should be paid to the estate of the deceased widow, the direct beneficiary.

At the outset we desire to state that the construction of the form of insurance policy involved in this case is of more widespread interest than merely to the parties to this proceeding. Appellees are advised that the form of language used in Section 11 of the General Provisions of the policy here in question has been regularly employed in life insurance policies issued by The Northwestern Mutual Life Insurance Company over a period of some seventeen years. The construction placed upon that language in this case will, therefore, have a broader effect than if the contract being construed were a unique specimen as between the present parties only.

It is submitted, with all respect, that a rehearing and reconsideration of this cause should be granted for the following reasons:

1. *The decision entered herein is in conflict with the law of the State of California in that it nullifies and gives no effect to the phrase "including any unpaid benefits due or to become due" contained in the insurance policy in question.*

The parties have agreed in their briefs that the insurance policy in question, having been negotiated for and delivered in California, must be interpreted in accordance with California law. (Appellants' Op. Br. pp. 12-13; Appellees' Br. pp. 1-2.)

California law requires that each and every clause and provision in a contract be given force and effect.[1]

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[1]Section 1641 of the California Civil Code provides:

"The whole of a contract is to be taken together, *so as to give effect to every part,* if reasonably practicable, each clause helping to interpret the other." (Emphasis added.)

Section 1858 of the California Code of Civil Procedure provides:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, *or to omit what has been inserted;* and where there are several provisions or particulars. such a construction is, if possible. to be adopted *as will give effect to all.*" (Emphasis added.)

Among the many California cases applying this rule are:

Cummins v. Bank of America (1941), 17 Cal. (2d) 846, at 849;

Scudder v. Perce (1911), 159 Cal. 429, at 433;

Neale v. Morrow (1907), 150 Cal. 414, at 418;

Schrank v. Sterling Products Co. (1939), 33 Cal. App. (2d) 107, at 110.

As was said in *L. C. Morgan Co. v. Christensen* (1924), 65 Cal. App. 474, at 478:

"If the construction which the defendant contends for should prevail, it would render nugatory the last covenant contained in the written instrument . . . it is the duty of the courts to give some force and effect to each and every clause contained in the contract."

The decision interpreting Section 11 of the General Provisions of the policy [R. pp. 43-44] as defining the rights of the beneficiaries *at the time of, but not after,* the death of the insured, results in the complete nullification, for all purposes under the contract, of the clause *"including any unpaid benefits due or to become due"* contained in sentences (B) and (C) of Section 11 (as designated on page 14 of Appellants' Opening Brief). There is no situation to which the quoted clause can apply under that construction.

The "unpaid benefits" clause cannot apply only to the "incidental" benefits in the form of dividends provided for under Section 9 of the General Provisions [R. pp. 42-43], as suggested by appellants (Op. Br. pp. 17-18) and, with all deference, as stated in the opinion of the Court. Those dividends are payable only to the insured during his life, and can *never* become payable to a beneficiary, direct or contingent, while the insured is alive. A beneficiary can receive a dividend under Section 9 only "with the proceeds of the Policy", *i. e.,* after the death of the insured. Under the construction placed on the policy by the decision herein, a contingent beneficiary can take under sentence (C) of Section 11 only if the direct beneficiary dies during the lifetime of the insured. Yet a direct beneficiary could never become entitled to receive dividends or post mortem dividends during the lifetime of the insured, and hence it would be impossible, under that construction, for the contingent beneficiary to succeed to the interest of a direct beneficiary "including any unpaid benefits due or to become due" in the sense of incidental benefits in the form of dividends. The quoted clause becomes entirely meaningless under that construction. It cannot apply only (as it is said to apply), or

indeed at all, to the "incidental" benefits. And even if it could apply to the "incidental" benefits, there is no reason for restricting its application to those benefits alone. The ordinary and usual meaning of "benefits due or to become due" under an insurance policy is certainly broad enough to include any and all proceeds thereof.

When effect is given to the phrase "including any *unpaid* benefits *due* or *to become due,*" as required by California law, the conclusion is inescapable that sentences (B) and (C) of Section 11 contemplate and refer to periods *both before and after* the death of the insured, and that when, as in this case, the direct beneficiary dies *after* the insured's death but *before* receiving the entire proceeds of the policy and before making an election of one of the options under Section 1a of the Special Provisions, the then unpaid benefits due or to become due are payable to the contingent beneficiaries (appellees herein).

It is a settled rule of law that the interest of a beneficiary, direct or contingent, where the right to change beneficiaries is reserved, is a mere expectancy until the death of the insured. (See Appellants' Op. Br. pp. 9-12.] Hence there can be nothing "due" or certain "to become due" to a direct beneficiary until after the insured's death. The proceeds of the policy become "due" only after death of the insured *and* upon receipt of due proof of death. [R. p. 39.] But after the death of the insured and before proof has been made, it is proper to say that the benefits are "to become due." Since nothing can be "due" or payable to a direct beneficiary until after the insured's death, it is clear that no "unpaid benefits" can be "due" to a direct beneficiary while the insured is alive.

Sentence (C) of Section 11 provides that upon the death of the last surviving direct beneficiary, the contingent beneficiaries "shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due." It may be conceded that a direct beneficiary who died before the death of the insured would have an expectancy "interest" to which the contingent beneficiaries might succeed under that provision. But no such expectancy "interest" of a direct beneficiary predeceasing the insured could possibly include "any unpaid benefits due or to become due" because, as noted above, no benefits of any kind could possibly become due or payable to a direct beneficiary prior to the death of the insured. To construe sentence (C) as stating that which takes place *only* upon the death of the direct beneficiary *prior* to the death of the insured, is with all respect, completely to nullify for all purposes the phrase "including any unpaid benefits due or to become due." In order to give effect to that phrase and to make it possible for a contingent beneficiary to succeed to the interest of a direct beneficiary, which interest includes "unpaid benefits due or to become due," the sentence must be construed as stating that which takes place upon the death of the direct beneficiary either *before* the death of the insured, or *after* the insured's death at a time when benefits due or to become due are as yet unpaid.

It is, of course, true that the rights of the contingent beneficiaries could have been cut off if the direct beneficiary in this case had actually received the full proceeds of the policy prior to her death or if she had elected one of the optional forms of settlement under Section 1a of the Special Provisions. If she had received full payment of the proceeds prior to her death, there would have

been no "unpaid benefits due or to become due" to which the contingent beneficiaries could have succeeded. And if she had elected one of the optional forms of settlement, Section 1a of the Special Provisions provides specifically that upon such election by the direct beneficiary "the interest of any Contingent Beneficiary designated by the Insured shall terminate." But that provision entitling the direct beneficiary, by appropriate action, to *terminate the interest of the contingent beneficiaries* designated by the insured, serves but to reinforce the construction contended for herein. If the rights of the direct beneficiary were intended to vest in her irrevocably at the first point of time occurring after the insured's death, she surviving him, then there would be no remaining interest of any contingent beneficiary which could be terminated under the above provision. There then would have been no need to insert the termination provision as a means of avoiding "conflict between the contingent beneficiary selected by the insured and a new contingent beneficiary selected by the wife" under Section 1a, as argued by appellants (Appellants' Op. Br. pp. 21-22). Under the construction placed upon the policy by the decision herein, the direct beneficiary's mere survival of the insured would have forever determined that the contingent beneficiaries had no interest whatsoever which would require termination or which could possibly conflict with the interests of a new contingent beneficiary selected by the wife. The construction adopted by the decision gives no effect whatever to the provisions of Section 1a of the Special Provisions with reference to the termination of the interest of the contingent beneficiaries upon election of one of the options by the direct beneficiary. That provision with respect to termination can be made meaningful only by

adopting a construction of the policy under which some interest remains in the contingent beneficiaries after the direct beneficiary survives the insured. The interest that so remains in the contingent beneficiaries is the right under sentence (C) of Section 11 to succeed to the interest of a direct beneficiary who dies after the death of the insured while there are "unpaid benefits due or to become due."

The construction of the policy herein contended for is supported by reason and by sound public policy. Insurance proceeds are normally intended to provide financial support for dependents, particularly during the period immediately following the death of the insured. There are, therefore, strong reasons in public policy for favoring a construction of an insurance policy which will permit the insurance company to make payment of the proceeds to a living beneficiary rather than to the estate of a deceased beneficiary. Funds paid into an estate may often be tied up for considerable periods of time, whereas funds paid to a living beneficiary may well provide essential financial assistance in an otherwise difficult period. The insertion in the policy by the issuing company of sentences (B) and (C) of Section 11 is a recognition of this general public policy. It was intended that this language would eliminate the delay and expense of probating the proceeds in the estate of the direct beneficiary in the event of the direct beneficiary's death after the death of the insured but prior to receipt of the proceeds. However, in order to protect the direct beneficiary in case of a change of circumstances or unusual delay in making payment, Section 1a of the Special Provisions was inserted. Under that section the direct beneficiary was given the right to cut off the interests of the contingent bene-

ficiaries if she so desired. The inclusion of those provisions nullifies the appellants' argument that the ascertainment of beneficiaries would be indefinite under our construction (Appellants' Op. Br. pp. 7-8), and makes inapplicable all the cases which have construed other types of contracts not containing provisions of this nature.

Furthermore, there is no inconsistency in the action of the insured in this case in making the proceeds of the policy subject to the absolute control of his wife if she should survive him and in also providing that those proceeds should go to his children in the event that his wife died before either receiving payment of the proceeds in full or electing an optional method of settlement. It is not at all unusual for an insured to provide a considerable degree of flexibility and latitude in the handling of the proceeds of his insurance by his beneficiaries.

2. *The decision entered herein is in conflict with the decision in Northwestern Mutual Life Insurance Co. v. Fink (C. C. A. 6, 1941), 118 F. (2d) 761, reaching a contrary conclusion as to the construction of a similar policy issued by the same insurance company, thus producing a divergence in the judicial construction of a widely used form of insurance policy.*

As noted above, the language of Section 11 of the policy here in question has been used in a large number of life insurance policies issued over a considerable period of time. It is therefore of more than ordinary importance to note that a policy issued by the same insurance company and containing in Section 11 substantially identical language, including the "unpaid benefits" clause, has been construed by the Circuit Court of Appeals for the Sixth Circuit in *Northwestern Mutual Life Insurance*

Co. v. Fink (1941), 118 F. (2d) 761, to require payment of the entire proceeds to the living contingent beneficiaries in a case where the direct beneficiary died after the death of the insured but before actually receiving any of the proceeds. In the *Fink* case, the direct beneficiary died before making proof of the insured's death rather than after making such proof as in this case; but that is not a material distinguishing factor, for the making of proof of death would affect only the time when the payments would become due. The Court in the *Fink* case, while it mentioned the failure to make proof of death, relied upon a construction of the policy and the terms of a separate designation of beneficiaries. That designation, which was different from the designation in this case, provided that: "In the event of the death of Charlotte Wolf [the direct beneficiary], *such share as she would have been entitled to receive* shall be payable to" the children of the insured. The court refused to adopt the contention of the administratrix of the direct beneficiary's estate that Charlotte Wolf, upon surviving the insured, became irrevocably vested with the right to the proceeds, saying that to do so would be in effect to rewrite the policy by inserting the words "before the death of insured" after the name of Charlotte Wolf in the sentence quoted above from the designation. It is submitted, with all deference, that the effect of the decision herein is to do just what the court in the *Fink* case declined to do.

In attempting to distinguish the *Fink* case, appellants have relied upon the language of the designation stating that if Charlotte Wolf died, "such share as she would have been entitled to receive" should be payable to the

children. Thus they assert that Charlotte could not have been "entitled to receive" anything until the death of the insured and conclude that the language of the designation therefore obviously spoke of her death after she was "entitled" to something, *i. e.,* at a time after the death of the insured. (Appellants' Op. Br. pp. 27-28.) It is respectfully submitted, however, that that case is indistinguishable in principle from this one. Under the provision in the policy here in issue stating that the contingent beneficiaries shall, upon the death of the direct beneficiary, succeed to her interest, "including any unpaid benefits due or to become due," it is clear that there could be no "unpaid" benefits "due or to become due" to the direct beneficiary until after the death of the insured. It thus follows that the provision states what is to happen not only when the direct beneficiary predeceases the insured, but also in the event of the death of the direct beneficiary when there are or may be "unpaid benefits due or to become due," *i. e.,* at a time after the insured's death.

If the decision entered herein is permitted to stand, it will be in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit upon the construction of a similarly worded insurance policy issued by the same company, a result which would be particularly undesirable in the case of a form of insurance policy which is in widespread use throughout the country.

3. *Section Two, Article III of the United States Constitution, and the Judicial Code, Section 24, 28 U. S. C. A., Section 41, do not give jurisdiction to the Federal District Court in an interpleader action where all claimants to the fund are residents of the same state.*

Appellants cite *Security Trust and Savings Bank v. Walsh* (C. C. A. 9, 1937), 91 F. (2d) 481, as authority that the District Court had jurisdiction in this action. It is respectfully submitted that the decision in *Treinies v. Sunshine Mining Co.* (1940), 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85, casts doubt upon this authority. In the *Treinies* case, the Supreme Court held that the Federal District Court had jurisdiction under 28 U. S. C. A., Section 41, Subsection 26, where the interpleader and one of the claimants to the fund were citizens of the same state, and where the claimants to the fund were citizens of different states. In so holding, the Court reasoned that since the controversy between the claimants "could have been settled by litigation between them in the federal courts," the limits of judicial power imposed by the Constitution were satisfied. The complainant (interpleader) was held to be a proper party to the determination of the controversy between the adverse claimants, citizens of different states, but the Court also pointed out that the deposit and discharge of the complainant effectively demonstrates its disinterestedness as between the claimants and as to the property in dispute. In other words, the real controversy in such an action as this is between the claimants, and not between the complainants and the claimants. How, then, in the instant case, could the District Court have had jurisdiction to determine the controversy between the adverse *claimants,* citizens of the same state, that is, California?

The controlling nature of the decision in the *Security Trust and Savings Bank* case is questioned by footnote 17 in the *Treinies* case, wherein it is said:

> "We do not determine whether the ruling here is inconsistent with the conclusion in those cases where

jurisdiction was rested on diversity of citizenship between the applicant and cocitizens who are claimants. (Mallers v. Equitable Life Assurance Soc., 7 Cir., 87 F. (2d) 233, certiorari denied, 301 U. S. 685, 57 S. Ct. 786, 81 L. Ed. 1343 (New York corporation impleads Illinois claimants); Security Trust & Savings Bank of San Diego v. Walsh, 9 Cir., 91 F. (2d) 481 (English corporation impleads California claimants); Penn. Mut. Life Ins. Co. v. Meguire, D. C., 13 F. Sup. 967, 971 (Pennsylvania corporation impleads Kentucky claimants); Turman Oil Co. v. Lathrop, D. C., 8 F. Supp. 870, 872 (Delaware corporation impleads Oklahoma claimants)."

See, also, *Central Life Assurance Society v. McGregor, et al.* (D. C. Washington, 1945), 60 F. Supp. 578.

On the basis of the foregoing, it is respectfully urged that this Petition for Rehearing should be granted, and that the insurance policy in question should be so construed as to require payment of the proceeds to the appellees, the Hill children, under the facts of this case.

Respectfully submitted,

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Certificate of Counsel.

The undersigned counsel for appellees do hereby certify that in their judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for purposes of delay.

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